STATEMENT OF PROFESSOR RONALD FILLER FOR THE CFTC/SEC ROUNDTABLE ON THE DEFINITIONS OF SWAP DEALERS AND MAJOR SWAP PARTICIPANTS
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MY NAME IS RONALD FILLER. I AM CURENTLY A PROFESSOR OF LAW AND THE DIRECTOR OF THE CENTER ON FINANCIAL SERVICES LAW AT NEW YORK LAW SCHOOL. UNDER MY DIRECTION, NYLS ESTABLISHED AN LLM IN FINANCIAL SERVICES LAW GRADUATE PROGRAM IN 2009 WHICH NOW OFFERS MORE THAN 40 COURSES INVOLVING ALL ASPECTS OF THE GLOBAL FINANCIAL SERVICES INDUSTRY, INCLUDING SIX COURSES ON DERIVATIVES LAWS AND PRODUCTS, FOUR ON HEDGE FUNDS/PRIVATE EQUITY, FOUR ON BANKING LAW ISSUES, THREE LITIGATION STRATEGY COURSES AND COURSES ON SUCH SUBJECTS AS PRIME BROKERAGE, GLOBAL COMPLIANCE ISSUES, AML, EXECUTIVE COMPENSATION, INSOLVENCY OF FINANCIAL INSTITUTIONS, AUDITS & EXAMINATIONS OF FINANCIAL FIRMS AND MANY OTHER GREAT COURSES. I ALSO SERVE AS A SENIOR CONSULTANT TO ALLEN & OVERY, A MAJOR GLOBAL LAW FIRM.

BEFORE JOINING THE NYLS FACULTY IN 2008, I WAS A MANAGING DIRECTOR IN THE CAPITAL MARKETS PRIME SERVICES DIVISION AT LEHMAN BROTHERS. DURING MY 35+ YEARS IN THE FUTURES INDUSTRY, I HAVE TAUGHT A DERIVATIVES LAW COURSE AT FOUR DIFFERENT U.S. LAW SCHOOLS COVERING A PERIOD OF OVER 30 YEARS, HAVE SERVED ON SEVERAL EXCHANGE, CLEARING HOUSE AND INDUSTRY BOARDS AND ADVISORY COMMITTEES AND HAVE LECTURED AND WRITTEN ON NUMEROUS IMPORTANT ISSUES FACING THE GLOBAL FUTURES AND DERIVATIVES INDUSTRIES. MY PARTICULAR SPECIALITY INVOLVES THE PROTECTION OF CUSTOMER ASSETS.

FIRST, I WANT TO COMMEND BOTH COMMISSIONS ON A JOB WELL DONE. DESPITE NOT HAVING THE ADEQUATE FINANCIAL AND PERSONNEL RESOURCES TO PROMULGATE ALL THE VARIOUS REGULATIONS REQUIRED BY THE RECENT DODD-FRANK ACT, I WANT TO THANK AND EXPRESS MY SINCERE GRATITUDE ON THE TREMENDOUS TIME AND COMMITMENT PUT IN BY THEIR STAFFS AND COMMISSIONERS. THIS IS INDEED A HISTORICAL AND MONUMENTAL EFFORT, ONE THAT BOTH COMMISSIONS SHOULD BE EXTREMELY PROUD OF WHAT THEY HAVE ACCOMPLISHED TO DATE. THIS DOES NOT MEAN THAT I NECESSARILY AGREE WITH ALL THE PROPOSED REGULATORY CHANGES BUT BOTH COMMISSIONS SHOULD RECEIVE A GRADE OF A+. EQUALLY AS IMPORTANT, THEY HAVE PROVIDED A TREMENDOUS OPPORTUNITY FOR COMMENTARY FROM ALL AFFECTED PARTIES.

AS TO THE ISSUES BEFORE US TODAY, THERE ARE SEVERAL REGULATORY POLICY ISSUES THAT NEED TO BE CONSIDERED BY THE COMMISSIONS. ON A SIDE NOTE, I EVEN TEACH A COURSE, ENTITLED “REGULATORY POLICY” IN THE LLM GRADUATE PROGRAM AT NYLS AS I STRONGLY BELIEVE THAT ALL FINANCIAL SERVICES LAWYERS SHOULD UNDERSTAND AND APPRECIATE THE “WHY” AND "HOW" OF OUR APPLICABLE LAWS AND REGULATIONS AND NOT JUST THE “WHAT”. IN FACT, THIS “REGULATORY POLICY” COURSE IS A REQUIRED COURSE FOR ANY LLM DEGREE STUDENT.

THE FIRST POLICY ISSUE FACING THE COMMISSIONS IN CONNECTION WITH THIS ROUNDTABLE IS WHETHER THE DEFINITION OF A “SWAP DEALER” SHOULD BE NARROWLY OR BROADLY DEFINED. I STRONGLY RECOMMEND A VERY NARROW DEFINITION. HOWEVER, IF THE COMMISSIONS ELECT A MORE EXPANSIVE DEFINITION, WHICH WOULD REQUIRE ANY FIRM THAT FALLS WITHIN THE DEFINITION TO BE SUBJECT TO ANY APPLICABLE ANTI-FRAUD REGULATION, THEN BOTH COMMISSIONS SHOULD CAREFULLY CONSIDER EXPANDING THE EXEMPTIONS FROM THE REGISTRATION, NET CAPITAL AND ALL OTHER REGULATORY PROVISIONS THAT MIGHT APPLY TO A SWAP DEALER. IF THE COMMISSIONS DO NOT BELIEVE THAT THEY HAVE SUCH FLEXIBILITY PURSUANT TO THE DODD-FRANK ACT, THEN THEY MUST AND SHOULD ESTABLISH THE APPROPRIATE EXEMPTIONS FROM THE DEFINITION ITSELF. OTHERWISE, AN EXPANDED DEFINITION WILL REQUIRE SMALL FINANCIAL FIRMS, BANKS AND END USERS THAT WERE OTHERWISE NOT THE MAIN SUBJECT OR INTENT BEHIND THE

DODD-FRANK ACT TO BECOME SUBJECT TO THE REGULATIONS THAT WILL APPLY TO SWAP DEALERS. BY EXPANDING THE EXEMPTIONS TO THE DEFINITIONS OR, IN THE ALTERNATIVE, TO THE REGISTRATION AND OTHER REGULATORY REQUIREMENTS, THESE SMALLER FINANCIAL FIRMS WILL NOT BE REQUIRED TO REGISTER AS A SWAP DEALER, MAINTAIN ANY MINIMUM NET CAPITAL REQUIREMENTS OR SATISFY ANY OTHER APPLICABLE REGULATORY PROVISIONS.

ANOTHER IMPORTANT POLICY ISSUE INVOLVES FOREIGN FIRMS. THIS IS PROBABLY THE MOST DIFFICULT BUT IMPORTANT POLICY ELEMENT FOR THE COMMISSIONS TO CONSIDER. SOME FIRMS ARE FOREIGN-BASED ENTITIES WITH A U.S. AFFILIATE WHILE OTHERS ARE U.S.-BASED FIRMS WITH A FOREIGN AFFILIATE. THE COMMISSIONS SHOULD CLEARLY STATE THAT THE DEFINITION OF A "SWAP DEALER" SHOULD NOT COVER ANY NON-U.S. FIRM THAT DEALS IN OTC DERIVATIVES WITH A NON-U.S. CUSTOMER. FURTHERMORE, WHILE THERE SEEMS TO BE A RELUCTANCE TO DATE TO CONSIDER OTHER REGULATORY RELIEF FOR FOREIGN FIRMS (WHAT WE IN FUTURES HAVE HISTORICALLY REFERRED TO AS FOREIGN BROKERS), THE COMMISSIONS SHOULD CLEARLY CONSIDER PROVIDING RELIEF FOR FOREIGN FIRMS WHICH DEAL WITH U.S CUSTOMERS WITH RESPECT TO THEIR OTC DERIVATIVES BUSINESS. THIS IS A GLOBAL WORLD. THE SHORES OF ONE COUNTRY DOES NOT, AND SHOULD NOT, PREVENT AN ELIGIBLE CONTRACT PARTICIPANT FROM ENGAGING IN BUSINESS, INCLUDING OTC DERIVATIVES, DIRECTLY WITH A NON-U.S. FIRM. IN FUTURES, PART 30 HAS PROVIDED AN ADEQUATE AND EXCELLENT BASE TO ALLOW FOREIGN BROKERS TO DEAL DIRECTLY WITH LARGE INSTITUTIONAL U.S. FUTURES CUSTOMERS. SIMILARLY, SEC RULE 15A-6 HAS ADDRESSED THIS SAME SITUATION FOR SECURITIES TRANSACTIONS. THE COMMISSIONS MUST NOW SERIOUSLY CONSIDER EXPANDING THIS EXISTING RELIEF TO FOREIGN FIRMS WHO DEAL DIRECTLY WITH U.S. CUSTOMERS IN CONNECTION WITH THEIR OTC TRANSACTIONS. OTHERWISE, THE WAY THE BUSINESS IS STRUCTURED, U.S. FCMS WILL NOT BECOME CLEARING MEMBERS OF NON-U.S. CLEARING HOUSES NOR WILL MOST NON-U.S. FINANCIAL FIRMS SEEK TO BECOME REGISTERED HERE IN THE U.S. THEREFORE, WITHOUT PROVIDING SOME TYPE OF PROACTIVE RELIEF, U.S. CUSTOMERS WILL BE PREVENTED FROM TRADING OTC DERIVATIVES OUTSIDE THE U.S. FURTHERMORE, THE EXPANDED USE OF OMNIBUS ACCOUNTS, BOTH BETWEEN U.S. FIRMS AS CARRYING BROKERS WITH NON-U.S. CLEARING FIRMS, AND VICE VERSA, IS AN EXTREMELY IMPORTANT POLICY ISSUE, ESPECIALLY AS CLEARED SWAPS BECOME A GLOBAL REQUIREMENT.

A THIRD CRITICAL POLICY ISSUE INVOLVES DOING BACK-TO-BACK SWAPS AMONG AFFILIATES OF THE SAME COMMON PARENT COMPANY, TYPICALLY SOLELY FOR THE PURPOSE OF ALLOCATING THE REQUIRED RISKS FROM ONE AFFILIATE TO ANOTHER. THESE BACK-TO-BACK OTC TRANSACTIONS DO NOT INCREASE THE RISK, BUT MERELY ALLOCATE THE RISKS WITHIN THE SAME CORPORATE GROUP. THE COMMISSIONS SHOULD, IN MY VIEW, EXEMPT FIRMS INVOLVED IN SUCH ALLOCATED TRADES FROM THE DEFINTION OF A "SWAP DEALER". NO ECONOMIC RISKS EXIST AND NEITHER AFFILIATE IS ENGAGED IN SUCH ALLOCATED TRADES SOLELY FOR THE PURPOSE OF EVADING ANY OF THE APPLICABLE LEGAL OR REGULATORY REQUIREMENTS. THE NEED FOR FLEXIBILITY IS A CRITICAL COMPONENT OF ANY EFFECTIVE REGULATORY SCHEME.

TO BE HONEST, I AM A FUTURES PERSON, ALWAYS HAVE BEEN AND PROBABLY ALWAYS WILL BE. THIS GREAT FUTURES INDUSTRY IS IN MY BLOOD. WE HAVE HISTORICALLY BEEN FORTUNATE, OR IS IT JUST A GREAT REGULATORY SCHEME CURRENTLY IN PLACE, BUT THERE HAVE BEEN FEW, IF ANY, MAJOR FUTURES PROBLEMS IN THE PAST 35+ YEARS. THE SYSTEM HAS WORKED. CLEARING HAS PROVIDED AN IMPORTANT FINANCIAL INTEGRITY ELEMENT TO THE INDUSTRY. AS WE WILL MOVE TOWARD A CLEARED SWAP ENVIRONMENT, NOT JUST DOMESTICALLY BUT GLOBALLY, WE MUST CONSIDER THE MAJOR CHANGES THAT HAVE EXIST, AND WILL CONTINUE TO EXIST, BETWEEN FUTURES AND SWAPS. AND ONE KEY ASPECT IS THE EXECUTION OF THE PRODUCT, A PRODUCT THAT HAS HISTORICALLY BEEN BASED ON THE ABILITY AND WILLINGNESS OF THE PARTIES TO CUSTOMIZE THE TERMS OF THE ARRANGEMENT. THAT IS WHY IT IS SO CRITICAL FOR THE COMMISSIONS TO MAKE SURE THAT NOT JUST THE REGULATIONS BUT THE DEFINITIONS ARE CAREFULLY CARVED OUT TO MAKE THE CLEARED SWAP WORLD WORK EFFECTIVELY AND EFFICIENTLY.

I TRULY APPRECIATE THE HONOR OF BEING INVITED HERE TODAY AND LOOK FO0RWARD TO PARTICIPATING IN THE DISCUSSION AND ANSWERING ANY QUESTIONS THAT THE STAFFS MIGHT HAVE.

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